Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 90–93)

CANCELLATION "WITH PREJUDICE" OF BROKER LICENSE NO. 5616 ISSUED TO KEITH KIM dba ALPHA CARGO SERVICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that the Secretary of the Treasury on November 29, 1990, pursuant to section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Parts 111.51(b) and 111.74 of the Customs Regulations, as amended (CFR 111.51(b),111.74), cancelled "with prejudice" the individual broker license (no. 5616) issued to Mr. Keith Kim.

Dated: November 29, 1990.

WILLIAM LUEBKERT,
Deputy Director,
Office of Trade Operations.

[Published in the Federal Register, December 4, 1990 (55 FR 50075)]

(T.D. 90–94)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR NOVEMBER 1990

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: November 12 and November 22, 1990.

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for November 1990 (continued):

Greece drachma:

November 1, 1990	$0.006551
November 2, 1990	.006549
November 5, 1990	.006583
November 6, 1990	.006585
November 7, 1990	.006596
November 8, 1990	.006577
November 9, 1990	.006562
November 13, 1990	.006579
November 14, 1990	.006601
November 15, 1990	.006581
November 16, 1990	.006651
November 19, 1990	.006598
November 20, 1990	.006594
November 21, 1990	.006607
November 23, 1990	.006566
November 26, 1990	.006536
November 27, 1990	.006545
November 28, 1990	.006566
November 29, 1990	.006472
November 30, 1990	.006452

South Korea won:

November 1, 1990	$0.001396
November 2, 1990	.001395
November 5, 1990	.001394
November 6, 1990	.001392
November 7, 1990	.001392
November 8, 1990	.001392
November 9, 1990	.001393
November 13, 1990	.001393
November 14, 1990	.001394
November 15, 1990	.001395
November 16, 1990	.001395
November 19, 1990	.001395
November 20, 1990	.001395
November 21, 1990	.001394
November 23, 1990	.001394
November 26, 1990	.001395
November 27, 1990	.001396
November 28, 1990	.001397
November 29, 1990	.001397
November 30, 1990	.001397

Taiwan N.T. dollar:

November 1, 1990	$0.036677
November 2, 1990	.036678
November 5, 1990	.036680
November 6, 1990	.036684
November 7, 1990	.036674
November 8, 1990	.036677
November 9, 1990	.036677
November 13, 1990	.036678
November 14, 1990	.036711
November 15, 1990	.036711

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for November 1990 (continued):

Taiwan N.T. dollar (continued):

November 16, 1990	$0.036701
November 19, 1990	.036701
November 20, 1990	.036724
November 21, 1990	.036746
November 23, 1990	.036789
November 26, 1990	.036728
November 27, 1990	.036724
November 28, 1990	.036738
November 29, 1990	.036726
November 30, 1990	.036661

(LIQ-03-01 S:NISD CIE)

Dated: December 4, 1990.

FRANK CANTONE,
Acting Chief,
Customs Information Exchange.

(T.D. 90–95)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR NOVEMBER 1990

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 90-79 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: November 12 and November 22, 1990.

Australia dollar:

November 1, 1990	$0.783700
November 2, 1990	.776500
November 5, 1990	.782000
November 6, 1990	.787000
November 7, 1990	.778500
November 8, 1990	.778100
November 9, 1990	.779400
November 13, 1990	.772500
November 14, 1990	.770700
November 15, 1990	.772000

FOREIGN CURRENCIES—Variances from quarterly list for November 1990 (continued):

Australia dollar (continued):

November 16, 1990	$0.769500
November 19, 1990	.763500
November 20, 1990	.765300
November 21, 1990	.763500
November 23, 1990	.765800
November 26, 1990	.766300
November 27, 1990	.768400
November 28, 1990	.769100
November 29, 1990	.772200
November 30, 1990	.774000

Austria schilling:

November 14, 1990	$0.096665
November 16, 1990	.096572
November 19, 1990	.096432

Belgium franc:

November 14, 1990	$0.032916

China, P.R. renimbi yuan:

November 16, 1990	N/A
November 19, 1990	$0.191015
November 20, 1990	.191015
November 21, 1990	N/A
November 23, 1990	.191015
November 26, 1990	.191015
November 27, 1990	.191015
November 28, 1990	.191015
November 29, 1990	.191015
November 30, 1990	.191015

Germany deutsche mark:

November 14, 1990	$0.679579
November 16, 1990	.679902

Ireland pound:

November 14, 1990	$1.821000
November 16, 1990	1.821500
November 19, 1990	1.819000

Japan yen:

November 2, 1990	$0.007776
November 5, 1990	.007776
November 6, 1990	.007855
November 7, 1990	.007803
November 8, 1990	.007698
November 9, 1990	.007708
November 13, 1990	.007716

FOREIGN CURRENCIES—Variances from quarterly rate for November 1990 (continued):

Japan yen (continued):

November 14, 1990	$0.007715
November 15, 1990	.007736
November 16, 1990	.007726
November 19, 1990	.007752
November 20, 1990	.007755
November 21, 1990	.007834
November 23, 1990	.007852
November 26, 1990	.007767
November 27, 1990	.007792
November 28, 1990	.007701

Netherlands guilder:

November 14, 1990	$0.602337
November 16, 1990	.602627

Portugal escudo:

November 5, 1990	$0.006618
November 6, 1990	.007660
November 7, 1990	.007654
November 14, 1990	.007701
November 16, 1990	.007695
November 19, 1990	.007678
November 20, 1990	.007680
November 21, 1990	.007672
November 27, 1990	.007683
November 28, 1990	.007669

(LIQ-03-01 S:NISD CIE)

Dated: December 4, 1990.

FRANK CANTONE,
Acting Chief,
Customs Information Exchange.

(T.D. 90–96)

REVOCATION OF IPIC, LTD., TO GAUGE IMPORTED PETROLEUM AND PETROLEUM PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of approval of a commercial gauger.

SUMMARY: Pursuant to Section 151.13, Customs Regulations (19 CFR 151.13), the approval to gauge imported petroleum and petroleum prod-

ucts granted to IPIC, Ltd, formerly located at 1234 West 8th Street, Los Angeles, California 90801 has been revoked with prejudice for failure to meet bonding requirements and provisions contained in the Commercial Gauger Agreement.

Accordingly, the approval of IPIC, Ltd., to gauge imported Petroleum and Petroleum products in all Customs districts is revoked.

EFFECTIVE DATE: November 30, 1990.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, Room 7113, 1301 Constitution Avenue, Washington, D.C. 20229 (202–566-2446).

Dated: December 4, 1990.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, December 7, 1990 (55 FR 50635)]

U.S. Court of Appeals for the Federal Circuit

E.M. CHEMICALS, PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Jerry P. Wiskin, Freeman, Wasserman & Schneider, of New York, New York, argued for plaintiff-appellee. With him on the brief were *Louis Schneider* and *Philip Yale Simons*.

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *Stuart M. Gerson*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief was *Karen P. Binder*, Attorney, U.S. Customs Service, of counsel.

Appeal No. 90–1141

(Decided November 28, 1990)

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before PLAGER, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and LOURIE, *Circuit Judge*.

LOURIE, *Circuit Judge*.

In this customs case, the initial classification by the United States Customs Service of certain liquid crystals as chemical mixtures was reversed on summary judgment by the United States Court of International Trade, which held that the liquid crystals should be classified as parts of indicator panels. *E.M. Chemicals v. United States*, 728 F. Supp. 723 (1989). The government appeals this judgment. We affirm.

BACKGROUND

Liquid crystals are compounds or mixtures which combine the properties of liquids and crystals, *i.e.*, they have fluidity, but at the same time have optical properties associated with crystal structures, permitting their molecules to segregate so as to produce visual effects in response to heat or an electric field E.M. Chemicals (E.M.) imported the liquid crystals at issue from Germany and Great Britain during the years 1982 and 1983. The imported liquid crystals all had benzenoid, quinoid, or modified benzenoid structures produced by a multistage synthetic chemical process.

During the relevant period, E.M.'s imported liquid crystals were used only in liquid crystal displays (LCDs). LCDs are devices for conveying numerical, alphanumerical, or graphical information. Widely known uses of LCDs included watches, clock radios calculators, computers, gas pumps, meters, various medical and scientific instrumentation, toys, and automobile dashboards.

In 1982 and 1983 these imported liquid crystals were classified as "chemicals * * * mixtures * * * other," by Customs under Item 407.16 of the Tariff Schedules of the United States (TSUS), *repealed by* the Harmonized Tariff Schedule of 1988, Pub. L. No. 100-418 (codified at 19 U. S. C. § 1202 (1988))*:

Schedule 4. Chemicals and Related Products.
Part 1. – Benzenoid Chemicals and Products

* * * * * * *

Subpart B. – Industrial Organic Chemicals

* * * * * * *

Mixtures in whole or in part of any of the products provided for in this subpart:

* * * * * * *

407.16 Other ..... 1.7 cents per pound + 13.6% *ad valorem*

E.M. challenged Customs' classification, claiming that the liquid crystals are properly classified as parts of "indicator panels * * * [or] other * * * visual signalling apparatus" under Item 685.70 of TSUS:

Schedule 6. Metals and Metal Products
Part 5. – Electrical Machinery and Equipment

* * * * * * *

685.70 Bells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus, all the foregoing which are electrical and parts thereof . . . 3.4% *ad valorem*

The Court of International Trade held, on summary judgment, that E.M. had overcome the presumption of correctness of the Customs Service's classification of the liquid crystals, and that the crystals are better classified as parts of indicator panels than as chemical mixtures.

ISSUE

The issue before us is whether the Court of International Trade erred in rejecting Customs' classification and in holding that the liquid crystals, as imported, are classifiable under Item 685.70, TSUS, as parts of "indicator panels * * * [or] other * * * visual signalling apparatus," rather than under Item 407.16, TSUS, as other chemical mixtures.

DISCUSSION

It is well-settled that the meaning of tariff terms is a question of law, while the determination whether a particular item fits within that mean-

*Based upon additional information from E.M. that some of the crystals consisted of single compounds rather than mixtures, the government amended its answer to suggest alternative classifications under Item 405.60 or 405.62 of TSUS relating to single industrial chemicals. In view of our disposition of this case, no further comment is necessary concerning these alternative classifications.

ing is a question of fact. *See Stewart-Warner Corp. v. United States*, 748 F.2d 663, 664-65, 3 Fed. Cir. (T) 20, 22 (1984); *Daw Industries Inc. v. United States*, 714 F.2d 1140, 1141-42, 1 Fed. Cir. (T) 146, 147-48 (1983). In this case, the Court of International Trade granted summary judgment, and we review that grant for legal correctness. The government argues that Item 685.70 does not include LCDs and, alternatively, that liquid crystals are not "parts" of LCDs, but are mere materials, and thus are not classifiable under Item 685.70. Additionally, the government argues that the Court of International Trade erred in precluding classification under the chemical Schedule. We consider each of these arguments in turn.

A. *Indicator Panels or Visual Signalling Apparatus Under Item 685.70:*

1. *Liquid Crystal Displays:*

In order to determine whether the imported liquid crystals are properly classifiable under Item 685.70, we first determine, as a matter of law, the proper scope of the classification "indicator panels * * * [or] other * * * visual signalling apparatus," and then determine whether the court properly granted summary judgment that LCDs come within this category. Although it is undisputed that liquid crystals are not indicator panels themselves, we need to determine if they are parts of LCDs, which may be indicator panels.

The trial court, in finding that LCDs are indicator panels or visual signalling apparatus, relied on *Texas Instruments Inc. v. United States*, 475 F. Supp. 1193 (Cust. Ct. 1979), *aff'd*, 620 F.2d 272 (CCPA 1980). That case held that visual light-emitting diodes (LEDs) were indicator panels:

> From the entire record in this proceeding, the court is satisfied that the merchandise in issue [LEDs] is properly classified * * * as an indicator panel or a visual signalling apparatus provided by item 685.70, TSUS. Logical reasoning dictates that this device receive the same classification as possessed by all other light emitting diodes, similarly constructed and performing the identical function of visual display in connection with the respective requirements of the specific article in which they must have been incorporated

Id. at 1197.

In relying on *Texas Instruments*, the Court of International Trade found that LCDs perform a function similar to that of LEDs, and that the main difference between them was that LEDs are self-illuminating, while LCDs are not. It concluded that LCDs should fall within the ambit of Item 685.70. We agree. It is uncontested that LCDs are devices which display information generally in alphanumeric, color, or graphic form and that LCDs function similarly to LEDs. Additionally, the trial court's conclusion is bolstered by the *Summary of Trade and Tariff Information*, Schedule 6, Control No 6-5-23 (USITC July 1982), which describes LCDs and LEDs as "two major kinds of indicator panels." *Id.* at 2; *Cf. Hawaiian Motor Co. v. United States*, 617 F.2d 286, 289 (CCPA 1980)(Summary of Trade and Tariff Information helpful to determine administrative prac-

tice, even though not suitable for use as evidence of Congressional intent). Clearly, LCDs should be classified under the same item as LEDs.

The government argues that LCDs are more than signalling devices or indicator panels because they are installed in articles that do not signal abnormal or unusual circumstances and because that classification is limited to articles that function in such circumstances. First, we note that we are concerned with the function of LCDs, wherever installed, and not with the many functions of articles in which LCDs are installed. For this reason alone, the government's reliance on *NEC America, Inc. v. United States*, 596 F. Supp. 466 (Ct. Int'l Trade 1984), *aff'd*, 760 F. 2d 1295 (Fed. Cir. 1985), is misplaced. The trial court correctly held that *NEC America* did not deal with LCDs themselves, but with the radio pagers at issue, which were the ultimate products into which the LCDs were incorporated.

Second, the government also relies on *NEC* to support its asserted limitation of Item 685.70 to the effect that a visual signalling device must "call attention to temporary or abnormal conditions." *See NEC*, 596 F. Supp. at 471 (citing *Oxford Int'l Corp. v. United States*, 75 Cust. Ct. 58, 68 (1978)). However, in a more thorough explanation of the "temporary or abnormal" limitation in the *Oxford* decision, the Court of International Trade later indicated that an indicator panel is properly classified under Item 685.70 if it merely conveys information. *A & A Int'l, Inc. v. United States*, 5 CIT 183, 187-89 (1983). We agree with this interpretation of Item 685.70. An LCD, as a signalling device or an indicator panel, may simply convey information or notify the user of a specific event. An LCD may operate in this manner in normal or abnormal circumstances. We do not think that LCDs fall outside Item 685.70 merely because they indicate or signal normal conditions

Additionally, unlike *Carling Electric Co. v. United States*, 757 F.2d 1285, 1287, 3 Fed Cir. (T) 109, 112 (1985), where this court held that a light is not classifiable under Item 685.70 because it does not always perform as a signalling device, LCDs normally perform as part of a signalling device or an indicating panel. We have not been referred to an example of an article containing an LCD where the LCD did not function as an indicating panel or a visual signalling device. During the relevant period of importation, LCDs incorporated into articles covering the spectrum from a child's toy to a physician's instrument have functioned as indicator panels or visual signalling devices.

Finally, tariff terms are to be construed in accordance with their common and popular meaning, in the absence of a contrary legislative intent. *See Nippon Kogaku (USA), Inc. v. United States*, 673 F. 2d 380, 382 (CCPA 1982); *Ozen Sound Devices v. United States*, 620 F. 2d 880, 882 (CCPA 1980). The terms "indicator panels" or "signalling devices" simply denote objects that "indicate" or "signal; they do not denote objects which only indicate or signal in abnormal or unusual circumstances. *See Webster's Third New International Dictionary* (1986) at 2115, 1150 (defining signal as, *inter alia*, "an object used to transfer or convey informa-

tion" and an indicator as, inter alia, "one that indicates"). Our review of the legislative history does not demonstrate that Congress intended to limit the common meaning of these terms. The only limits on these terms are in the schedule itself, *viz.*, that the indicator panel or signalling device must be electrical and visual. It is undisputed that the LCDs are both electrical and visual.

We therefore hold, as a matter of law, that the language "indicator panels * * * [or] other * * * visual signalling apparatus," in Item 685.70, includes devices that signal or indicate generally, not just in unusual or abnormal circumstances. We also conclude that the trial court did not err in granting summary judgment that LCDs come within the scope of Item 685.70

2. *The Imported Liquid Crystals:*

We next determine whether the imported liquid crystals are parts of LCDs. A part of an article is "something necessary to the completion of that article * * * without which the article to which it is to be joined, could not *function as such article.*" *United States v. Willough by Camera Stores, Inc.*, 21 CCPA 322, 324 (1933), cert. denied, 292 U.S. 640 (1934) (emphasis in original, citations omitted). Moreover, General Interpretative Rule 10(ij), TSUS, provided that a tariff provision for "parts" of a named class of articles applied to those products "chiefly used" as parts of such articles.

The government argues that even if the signalling apparatus provision is broad enough to encompass liquid crystals, the crystals in their imported condition are mere "materials," not "parts." Such a determination depends on whether the imported crystals were sufficiently processed to be dedicated for use in LCDs. *See The Servco Co. v. United States*, 68 Cust. Ct. 83 (1972), *aff'd*, 477 F.2d 579 (CCPA 1973) (import classified as material, not part, because substantial additional processing was necessary before import could be used as a part of a given article).

The Court of International Trade held that the liquid crystals are "parts" of LCDs for tariff classification purposes. It based this conclusion on extensive evidence relating to the manufactured state of the liquid crystals and the manner in which they are incorporated into LCDs. It is undisputed that during the period of importation, the liquid crystals were sufficiently processed to have only one commercial application – for use in LCDs. In fact, LCDs cannot function as such without liquid crystals. Because the crystals have been processed sufficiently to dedicate them for use in LCDs, the court found that the crystals are not mere materials.

The government further argues that because complex or subsequent processing is involved, the liquid crystals cannot be parts of indicator panels. Even though, as imported, the liquid crystals could have been mixed with each other to change their properties, the trial court properly determined that their dedicated use in LCDs was fixed with sufficient certainty without further processing to qualify them as parts. Moreover, where an LCD manufacturer adds a twist agent liquid crystal to another

imported liquid crystal after importation or otherwise mixes the crystals, as occurred here, the court held that this simple mixing operation does not amount to substantial further processing of either crystal.

Accordingly, the Court of International Trade determined that this mixing was more akin to an assembly operation combining mechanical and that there was insufficient subsequent processing to preclude the liquid crystals from being classified as parts of indicator panels. We have reviewed the record and we agree with the trial court's conclusion that the liquid crystals are "parts" of indicator panels. We find no error in the grant of summary judgment.

B. *Benzenoid Chemicals Under Item 407.16:*

Having concluded that the liquid crystals are properly classified as parts of indicator panels, we next consider whether they are also properly classified in another part of the tariff schedule. More specifically, did the Court of International Trade err in determining that the liquid crystals are not classifiable under the chemical schedule, Item 407.16, because "the utilization of liquid crystals for their physical, rather than their chemical, properties demands their removal from the chemical schedule"? 728 F. Supp. at 726. We believe the court did err on this point.

First, the record shows that the liquid crystals at issue here are produced by chemical companies and are readily identifiable and understood to be chemicals. *See McGraw-Hill Encyclopedia of Science & Technology*, Vol. 10 (6th Ed., 1987), at pp. 110-11 (identifying selected liquid crystal compounds by their scientific names and formulas). The constituent compounds of the liquid crystals are identifiable by their Chemical Abstract Service Registry Numbers and are described or identified by chemical names and formulas in the technical literature describing their application. *See, e.g.*, G. Gray, *Advances In Liquid Crystal Materials For Applications* (BDH Chemicals, Ltd. 1978); E. M. Chemicals, *Licristal Liquid Crystals* (company brochure on liquid crystals) (J. App. 248-56). All the imported crystals in question have the benzenoid structure that is specifically provided for in Schedule 4, part 1, subpart B.

Second, there is no foundation for the trial court's determination that because liquid crystals are used for their physical properties, such use makes the crystals unclassifiable in Schedule 4, Part 1. Simply because a product's use is ultimately based on its physical properties, as opposed to having uses in which it acts by chemical reaction to create different chemical products or to alter the properties of other materials, is not a sufficient reason to preclude classification under the chemical schedule. Indeed, many of the products specifically set forth in Schedule 4, part 1, are useful based most directly upon their physical, rather than their chemical, properties. *See, e.g.*, Colors, dyes, stains, and related products, Item 406.02-80, TSUS; Ink powders, Item 405.10, TSUS; Photographic chemicals, Item 405.20, TSUS; and Aromatic or odoriferous compounds, Item 408.0580 TSUS. Physical and chemical properties are both derived from the specific chemical identity of a material.

We note that Congress, in enacting the TSUS in 1962, provided for a comprehensive chemical schedule for existing and future products of the chemical industry in Schedule 4. *See Tariff Classification Study, Explanatory and Background Materials, Schedule 4—Chemicals and Related Products* at 2 (November 15, 1960). The Explanatory Notes state that:

> [t]he chemical industry introduces tens of thousands of new products to commerce each year and about half of the current sales of chemicals today are products unknown twenty year ago. Schedule 4 provides for these developments and anticipates, so far as practicable, such changes in the character of international trade as may occur in the near future.

Id. Thus, the schedule contemplates that its general categories encompass new compounds to be imported in the future. The compounds at issue here certainly fall within the general category of benzenoid, etc., compounds.

We conclude, therefore, that the imported liquid crystals are chemical products (or mixtures thereof) within the scope of the chemical schedule and that the trial court erred in finding that use for their physical rather than chemical properties requires removal from the chemical schedule. However, as shown below, this does not affect our overall assessment of the correctness of the judgment of the Court of International Trade.

C. *The Rule of Relative Specificity:*

Having concluded that the liquid crystals are properly described either as chemical mixtures under Item 407.16 or as parts of indicator panels under Item 685.70, we therefore next determine which of the two categories is the proper classification in this case.

Classification of an article falling within two or more tariff provisions was governed by General Interpretative Rule 10(c), TSUS:

> (c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but * * * :
>
> * * * * * * *
>
> ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., between the primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading.

The primary headings requiring comparison in the present case are:

> Mixtures in whole or in part of any of the [industrial organic chemicals having a benzenoid, quinoid, or modified benzenoid structure, or acyclic organic chemical products which are obtained, derived, or manufactured therefrom]
>
> and
>
> Bells, sirens, indicator panels, burglar and fire alarms, and other sound or visual signalling apparatus * * * and parts thereof.

The "chemical mixtures" heading is a residual classification of general description, and as such is the broadest type of tariff classification. *See* Sturm, *Customs Law and Administration*, § 53.1 (3d Ed. 1989). The provision for parts of "indicator panels * * * [or] other * * * visual signalling apparatus," on the other hand, is a "use" provision. General Interpretative Rule 10(ij) ("a provision for 'parts' of an article covers a product * * * used as a part of such article"). The Court of International Trade determined that the liquid crystals are more specifically provided for under the tariff provision most accurately describing their use rather than under the chemical schedule, which describes their composition. We agree.

One of our predecessor courts has established the principle that, when two or more tariff categories are equally descriptive of an item, one that describes a use governs over one which describes the composition of the item. *See United States v. Siemens America, Inc.*, 653 F. 2d 471, 478 (CCPA 1981)("[I]n the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is *generally* more specifically provided for under the use provision").

Since Item 685.70 is a "use" provision, it describes the imported items with relatively greater specificity than the descriptive residual chemical provisions relied upon by the government; based on the general rule of interpretation stated above, the use provision should govern.

CONCLUSION

In summary, the imported liquid crystals are chemical mixtures or compounds within the scope of Item 407.16; they cannot be removed from the chemical schedule merely because they are used for their physical rather than chemical properties. However, the liquid crystals also fall within the scope of Item 685.70 as parts of indicator panels or other signalling apparatus; they are properly classified as such because Item 685.70 is a use provision which describes them with more relative specificity than the chemical classification.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–119)

KALAN, INC., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 88-08-00688

ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Under 19 § 1520(d), plaintiff seeks to recover interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties. Defendants move for summary judgment, and plaintiff cross-moves for summary judgment.

Held: Under 19 U.S.C. § 1520(d) importers are entitled to interest on refunds from "the date of payment" of all "increased or additional duties under section 1505(c)." Since 19 U.S.C. § 1505(c) applies only to "[d]uties determined to be due upon liquidation or reliquidation," it is the holding of the court that 19 U.S.C. § 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties. Rather, since the estimated duties paid by plaintiff became duties due upon liquidation, it is the holding of the court that plaintiff is entitled to interest on its refunds from the date of liquidation.

[Defendants' motion denied in part and granted in part; Plaintiff's cross-motion denied in part and granted in part.]

(Dated November 21, 1990)

Sidney N. Weiss, for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*James A. Curley*), and (*Sheryl A. French* and *Karen P. Binder*, of Counsel, United States Customs Service), for defendants.

RE, *Chief Judge*: In general terms, the question presented in this case pertains to the date from which importers are entitled to interest, under 19 U.S.C. § 1520(d), on refunds of estimated duties deposited upon the entry of the merchandise.

The merchandise in this action consists of key tags imported from the Republic of Korea. Upon liquidation, the merchandise was classified by the Customs Service as jewelry under item 740.41 of the Tariff Schedules of the United States (TSUS), with duty at the rate of 11 per centum *ad valorem*. Plaintiff protested this classification and contended that the merchandise was properly classifiable as "[a]rticles not specially provided for, of rubber or plastics," under item 774.58, TSUS, free of duty under the Generalized System of Preferences. This protest was denied, and suit was thereafter commenced in this court. In *Kalan, Inc. v. United*

States, 12 CIT ____, slip op. 88–165 (Dec. 1, 1988) (Kalan I), this court held that the merchandise was properly classifiable as "[a]rticles not specially provided for, of rubber or plastics," under item 774.58, TSUS, and entered judgment in favor of plaintiff.

It is not disputed that, upon the entry of the merchandise, plaintiff paid estimated duties. It is also not disputed that the entries in this case have been reliquidated in accordance with the decision of this court in *Kalan I*, that all overcharged duties have been refunded to the plaintiff, and that plaintiff has not received any interest on the refunded duties.

Plaintiff contends that, pursuant to 19 U.S.C. § 1520(d), it is entitled to interest on the refunded duties from the date of the actual payment of the estimated duties. According to plaintiff, the excess estimated duties deposited upon the entry of the merchandise are "increased or additional duties within the meaning of section 1520(d), which mandates payment of interest retroactive to the date of payment.

Defendants contend that plaintiff "is not entitled to payment of interest under 19 U.S.C. § 1520(d) because the language of the statute does not provide for such payment on a refund of estimated duty."

Plaintiff also contends that, under 28 U.S.C. § 2644, it is entitled to interest on the excess duties paid from the date of the filing of the summons. In its motion for summary judgment, defendants admit that plaintiff is entitled to interest from the date of the filing of the summons. Defendants also "consent to entry of an order allowing payment of interest to Kalan under § 2644 from August 26, 1988, the filing date of the summons, to the date of refund."

The question presented is whether, under 19 U.S.C. § 1520(d), plaintiff is entitled to interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

Under section 1520(d) importers are entitled to interest on refunds from "the date of payment" of all "increased or additional duties under section 1505(c)." Since section 1505(c) applies only to "[d]uties determined to be due upon liquidation or reliquidation," the court concludes that section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties. Rather, since the estimated duties paid by plaintiff became duties due upon liquidation, it is the holding of the court that plaintiff is entitled to interest on its refunds from the date of liquidation.

Contending that there are no genuine issues of material fact, both parties move for summary judgment pursuant to Rule 56 of the Rules of this Court.

Discussion

On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Furthermore, "[t]he court may not resolve or try factual issues on a motion for summary judgment." *Phone-Mate, Inc. v.*

United States, 12 CIT ____, 690 F. Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989).

Defendants contend that section 1520(d) does not apply to estimated duties, which are paid upon entry of merchandise, and they therefore contend that plaintiff is not entitled to any interest under section 1520(d) on the refunds of its estimated duties. It is clear, however, that although plaintiff has paid estimated duties upon entry, once the merchandise is liquidated, the duties are no longer estimated. Rather, they then became "[d]uties determined to be due upon liquidation," within the meaning of section 1505(c). Hence, the specific question presented in this case is whether, under section 1520(d), plaintiff is entitled to interest on a refund of estimated duties, paid upon the entry of the merchandise, from the date of payment of those duties, or whether plaintiff is entitled to interest from the date of liquidation.

The question presented is to be resolved by an interpretation of the governing statutes. It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 1520(d) provides that:

> *If a determination is made to reliquidate an entry as a result of a protest filed under section 1514* of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, *interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title* at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

19 U.S.C. § 1520(d) (1988) (emphasis added).

Section 1505(c), which is expressly referred to in section 1520(d), provides that:

> Duties determined to be due *upon liquidation or reliquidation* shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

19 U.S.C. § 1505(c) (1988) (emphasis added). It is important to note that both section 1520(d) and section 1505(c) were enacted as section 210 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 2977 (1984).

The interpretation of section 1520(d) together with section 1505(c) indicates that Congress did not intend to grant interest on refunds of estimated duties from the date of payment of those duties. Section 1520(d) is expressly limited to "increased or additional duties under section 1505(c)." Section 1505(c), in turn, is expressly limited to "[d]uties determined to be due upon liquidation or reliquidation." It is clear, therefore,

that section 1520(d) does not grant interest on refunds of estimated duties paid upon the entry of the merchandise.

Furthermore, it is well established that, as part of the legislative history of a statute, the testimony presented at congressional hearings may be helpful in ascertaining the intent of Congress. *See, e.g., Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204-12 (1980). In this case, the testimony and comments received by the Subcommittee on Trade of the House Ways and Means Committee on H.R. 3159, the House bill which was eventually enacted into law as section 210 of the Trade and Tariff Act of 1984, provides convincing support for the conclusion of the court. A careful review of the testimony and comments leaves no doubt that, in considering H.R. 3159, the Subcommittee on Trade was aware that the government, bar, and industry understood that the bill did not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

For example, Arthur I. Rettinger, an attorney with the Office of the Chief Counsel of the United States Customs Service, testified that "the bill in no way affects overpayments or underpayments of estimated duties as these payments have traditionally been recognized as separate and distinct from liquidations for refunds or liquidations involving additional assessments." *Hearings on H.R. 3159 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. (1983), *reprinted in Miscellaneous Tariff and Trade Bills: Hearings and Written Comments Before the Subcomm. on Trade of the Comm. on Ways and Means of the House of Representatives*, 98th Cong., 1st and 2d Sess., Serial 98-76, at 18 (1985) (hereinafter *Hearings*).

The industry's interpretation of H.R. 3159 may be gleaned from the statement of Eugene J. Milosh, executive vice president of the American Association of Exporters and Importers (AAEI). Mr. Milosh explained that:

> At the time of entry the Customs Service has the authority under section 505(a) of the Tariff Act of 1930, authority which it frequently exercises, to insist that the importer pay estimated duties in an amount deemed appropriate by the Service. It is AAEI's belief that the great majority of entries are accompanied by duty deposits in amounts ultimately deemed proper by the Customs Service. *These duty deposits are not the subject of this legislation. H.R. 3159 addresses only increased duties, that is additional duties found due subsequent to entry at the time of liquidation or reliquidation.*

Hearings at 113. Indeed, in his testimony regarding the bill Mr. Milosh set forth a proposed amendment which would have granted interest on refunds of estimated duties from the date of entry. *See id.* at 114-16. Furthermore, Ms. Marjorie M. Shostak, appearing before the Subcommittee on behalf of the Joint Industry Group, stated that "[t]he provision in * * * H.R. 3159 to pay interest on reliquidations of entries applies only to amounts deposited as increased duties and does not include the duty deposited when the entry was filed." *Id.* at 129. Like Mr. Milosh, Ms. Shos-

tak recommended that "interest should be paid on any amounts refunded, not merely the increased duty portion thereof." *Id.*

The interpretation of the bar was given by Joseph F. Donohue, Jr., the Chairman of the Administrative Practice Committee of the Customs and International Trade Bar Association. Mr. Donohue stated that H.R. 3159 "provides for the payment of interest on any repayment of increased duties." *Id.* at 117. Mr. Donohue also noted that Customs determines the amount of estimated duties deposited upon the entry of the merchandise. He then advocated that H.R. 3159 be amended to provide for interest on refunds of estimated duties from the date of entry, since "[i]t would be appropriate to include interest on such refund[s] since the importer was deprived [of] the use of the money during the period that it was held by Customs." *Id.* at 120.

A statement was also submitted by the Section of Administrative Law of the American Bar Association. In its statement, the Section stated that it "[s]upports the provisions of [H.R. 3159] for the payment by the Government of interest on any repayment of increased duties and recommends also that interest be paid on refunds of duty deposited against the original entry." *Id.* at 215.

It is important to note that none of the witnesses who appeared before the Subcommittee interpreted H.R. 3159 to grant interest on refunds of estimated duties from the date of payment of those duties. Furthermore, despite the suggestions of several of the witnesses before the Subcommittee, Congress did not amend H.R. 3159. Hence, the conclusion is inescapable that, after considering the testimony of the witnesses and choosing not to act on the suggested amendments, Congress intended that importers should not receive interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties.

CONCLUSION

Under 19 U.S.C.§ 1520(d) importers are entitled to interest from "the date of payment" on refunds of all "increased or additional duties under section 1505(c)." Since 19 U.S.C. § 1505(c) applies only to "[d]uties determined to be due upon liquidation or reliquidation," the court concludes that section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties. Rather, since the estimated duties paid by plaintiff became duties due upon liquidation, it is the holding of the court that plaintiff is entitled to interest on its refunds from the date of liquidation.

Accordingly, defendants' motion is denied in part and granted in part, and plaintiff's cross-motion is denied in part and granted in part.

(Slip Op. 90–120)

HOSPITAL CORP. OF AMERICA, PLAINTIFF *v.*
UNITED STATES, DEFENDANT

Court No. 89-08-00462

Plaintiff seeks to recover interest under 19 U.S.C. § 1520(d) and 28 U.S.C. § 2644 on a refund paid by the United States Customs Service following Customs' decision to reliquidate plaintiff's goods at a lower rate of duty. Defendant maintains that the refund was of estimated duties, and the statute authorizes payment of interest on refunds of "increased or additional duties" not on refunds of estimated duties.

Held: Plaintiff is entitled to interest on the refund paid by Customs as a result of the reliquidation of its merchandise at a lower rate of duty. Once Customs liquidates an entry, the estimated duties are used to pay the duties due upon liquidation, and an overpayment of such duties entitles importer to a refund with interest of that overpayment.

[Plaintiff's motion for summary judgment is granted. Defendant's motion for summary judgment is denied.]

(Dated November 23, 1990)

Ober, Kaler, Grimes & Shriver (*John F. Morkan, III*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*); of counsel: *Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Hospital Corporation of America ("HCA"), brings this action pursuant to Rule 56 of the rules of this Court for summary judgment, asserting that there is no dispute as to any material facts and that it is entitled to judgment is a matter of law. Plaintiff seeks to recover interest under 19 U.S.C. § 1520(d) (1988), and 28 U.S.C. § 2644 (1988), on a duty refund paid by the United States Customs Service ("Customs").[1] Defendant argues that the refund was of estimated duties and section 1520(d) does not authorize the payment of interest on refunds of estimated duties, only on refunds of "increased or additional duties."

BACKGROUND

Plaintiff imported the Dornier extracorporeal shock wave lithotripter ("lithotripter") involved in this action in 1986. The lithotripter is a medical device which uses electrical charges to create shock waves that disintegrate kidney stones within a patient's body without surgical intervention. Prior to entry of the merchandise, Customs classified lithotripters as "electro-surgical apparatus" under item 709.15, Tariff Schedules of the United States ("TSUS"). C.S.D. 84-60 (Dec. 30, 1983).

The merchandise then was entered under item 709.15 and stored in a bonded warehouse. In order to release the lithotripters, Customs re-

[1] The government has consented to the payment of interest under 28 U.S.C. § 2644, on the refund already paid by Customs to HCA on September 8, 1989. *Defendant's Brief In Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment* at 5-6 ("Defendant's Brief"). That interest is payable from the date the summons was filed, August 3, 1989, to the date the refund was paid, September 8, 1989. 28 U.S.C. § 2644 (1988). However, that does not address payment of interest on the monetary judgment at issue in this case, i.e., the award of interest on the refund.

quired a deposit of estimated duties in the amount of $219,157.89, which was the amount due pursuant to classification under 709.15.[2] These duties were deposited by HCA "unwillingly, "so that the goods would be released. *Brief in Support of Hospital Corporation of America's Motion for Summary Judgment* at 3 ("Plaintiff's Brief"). On April 3, 1987, Customs liquidated the lithotripter under item 709.15, TSUS.

Plaintiff filed a protest on June 26, 1987, challenging the classification of the merchandise under item 709 .15, TSUS, and claiming classification under item 709.17, TSUS, as "electromedical apparatus, * * * other," which carries a lower rate of duty. In January 1988, Customs revoked its classification of lithotripters under item 709.15, TSUS, and held that lithotripters are properly classified under item 709.17, TSUS, the classification requested by plaintiff in its protest. C.S.D. 88-5 (Jan. 21, 1988). In April 1989, plaintiff requested accelerated disposition of the protest, pursuant to 19 U.S.C. § 1515(b) (1988) and 19 C.F.R. 5 174.22 (1988). The protest was deemed denied when Customs did not act on the request within thirty days. *See* 19 U.S.C. §1515(b); 19 C.F.R. § 174.22(d).

HCA filed a summons on August 3, 1989, challenging the classification and the rate and amount of duties. On September 7, 1989, plaintiff filed its Complaint, wherein HCA sought to recover a refund plus interest pursuant to 19 U.S.C. § 1520(d). The next day, September 8, Customs granted the protest, noting that lithotripters should be classified under item 709.17, TSUS. The entry was reliquidated and Customs refunded to HCA the difference between what initially was paid to Customs pursuant to item 709.15, TSUS, and what properly was due under item 709.17, TSUS. However, Customs paid no interest on the refund.

None of these facts is in dispute, and both parties have moved for summary judgment pursuant to Rule 56 of the Rules of the Court of International Trade.

Discussion

When deciding a motion for summary judgment pursuant to Rule 56, the Court must determine if there are any genuine issues of material fact. *Phone-Mate, Inc. v. United States*, 12 CIT ____, ____, 690 F. Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989). If there are, summary judgment is inappropriate. Upon examination of the relevant statutes, caselaw and supporting papers, the Court finds that there are no genuine issues of material fact, and hence, judgment as a matter of law is proper in this matter.

I. *19 U.S.C. § 1520(d):*

When Customs liquidates an entry, the importer of the entry must pay the duty owed within fifteen days after the date of liquidation. 19 U.S.C. § 1505(c) (1988). If payment is not received by Customs within thirty

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[2] Customs states that it gave HCA a refund of $25,727.23 at the time of liquidation in April 1987, because the estimated duties had been assessed improperly based on the 1986 rate of 9.2% *ad valorem* rather than on the lower 1987 rate of 7.9% *ad valorem*. No interest was paid on this refund and plaintiff does not seek to recover interest on this amount. *See Defendant's Brief* at 2. Following the refund, the total estimated duties on deposit with Customs was $193,430.66.

days after such date, interest is due from the fifteenth day after the date of liquidation. *Id.*; *Syva Co. v. United States*, 12 CIT ____, ____, 681 F. Supp. 885, 88990 (1988); *Penrod Drilling Co. v. United States*, 13 CIT____, ____, 727 F. Supp. 1463, 1465 (1989). The provision which authorises the government to collect interest on late payments was added to § 1505 by the Trade and Tariff Act of 1984, and was designed to prevent importers from delaying payment of duties owed to the United States. The rationale for this change was that the United States was denied the rightful use of this money while the importer profited from it.

In fashioning this legislation, Congress acknowledged that if the government is permitted to collect such interest, importers too ought to be allowed to collect interest on overpayments if they are successful in protesting the classification of their merchandise. H.R. Rep. No. 1015, 98th Cong., 2d Sess. 68, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4960, 5027. This "reciprocity of payment of interest" was accomplished "by adding a new paragraph which would provide for interest to be paid by the government if a determination is made to reliquidate an entry as result of protest * * *. Interest would be paid on the amount of the overcharge at a rate to be determined by the Secretary of the Treasury." *Id.* at 67.

In the present case, HCA "as overcharged on the duties it owed for the lithotripter. When Customs liquidated the entry on April 3, 1987, it collected the duty due pursuant to liquidation under item 709.15, TSUS, that is $193,430.66.[3] *See* note 2, *infra*. Plaintiff protested the classification on June 26, 1987. After Customs granted the protest and reliquidated the entry on September 8, 1989, under item 709.17, TSUS, it refunded to plaintiff the difference between what was paid by plaintiff under item 709.15, TSUS, and what properly was owed under item 709.17, TSUS, that is, the overcharge. However, Customs paid no interest on the overcharge and denies that interest is owed to the importer.

Section 1520(d) provides that interest is payable when Customs reliquidates an entry and returns to the importer what was paid as "increased or additional duties under section 1505(c)." Section 1505(c) sets the time limits for payment of "[d]uties determined to be due upon liquidation."[4] If Customs or this Court thereafter determines that excess duties were paid upon liquidation, the importer is entitled to a refund of those excess duties plus interest. 19 U.S.C. § 1520(a) and (d).

Customs contends, however, that "increased or additional duties" do not include excess estimated duties retained by Customs upon liquida-

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[3] Since plaintiff had deposited estimated duties prior to liquidation, the monies due were already in Customs custody long before the liquidation.

[4] 19 U.S.C. § 1505(c) provides that:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

tion.[5] The government thus construes the increased or additional duties referred to in section 1520(d) to be only those duties which, at the time of liquidation, Customs finds are due in addition to any estimated duties already assessed. This interpretation is founded on Customs' contention that an importer who has deposited estimated duties does not pay any duties at liquidation, unless "increased or additional duties" are imposed. "The only duties paid by [such importers are] estimated duties paid at the time of entry of the merchandise, or shortly after." *Defendant's Brief* at 2, n.2.

The Court finds that Customs has construed § 1520(d) too narrowly to be consistent with its legislative intent, and has improperly excluded excess estimated duties held by Customs upon liquidation from the purview of the section. Estimated duties do not exist in a vacuum. They are the amount which Customs believes will be the duties the importer will owe upon liquidation.[6] Once merchandise is liquidated and Customs determines the duty owed "upon liquidation," the estimated duties cease to be estimates. Whatever portion of those duties is retained by Customs constitutes the duty paid upon liquidation. Though plaintiff did not itself send payment to customs at liquidation, the estimated duties on deposit with Customs were used to pay what plaintiff was found to owe upon liquidation. Hence, when Customs retained more of HCA's deposit of estimated duties than it should have, HCA paid excess duties upon liquidation.

After the government granted the protest and reliquidated the lithotripter at a lower rate of duty, HCA was entitled to, and received, a refund of the duties it overpaid. 19 U.S.C. § 1520(a). Since the government had use of that money to which it had no rightful claim, 19 U.S.C. § 1520(d) allows the importer to collect interest on the refund. Plaintiff should not be denied interest because it deposited estimated duties prior to liquidation, rather than wait until after liquidation to pay. For the Court to hold otherwise would be to subvert what Congress manifestly intended in enacting reciprocal interest provisions.[7]

II. *28 U.S.C. § 2644:*

Plaintiff also seeks to recover interest under 28 U.S.C. § 2644. That section authorizes the payment of interest on monetary relief obtained under a stipulation agreement or by a judgment in a civil action before this Court pursuant to section 515 of the Tariff Act of 1930. 28 U.S.C. 2644; *United States v. Atkinson*, 6 CIT 257, 261, 575 F. Supp. 791, 795

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[5]Customs bases this argument on the fact that within § 1505, "estimated duties" and "increased or additional duties are discussed in different subsections." *See* 19 U.S.C. § 1505(a) and (b).

[6]Customs' regulations state that the amount of estimated duties to be deposited shall be "an amount deemed necessary by the district director to sufficiently cover the prospective duties on each item being entered or withdrawn." 19 C.F.R. § 141.103 (1989).

[7]The government contends that this position is not truly reciprocal because Customs would be liable for interest on refunds of estimated duties while the importer would not be liable for interest on estimated duties that are due but are not paid at the time of entry. *Defendant's brief* at 8. The analogy is inapposite because the Court is not holding that the statute compels Customs to pay interest from the date the estimated duties were paid. Rather, Customs is liable for interest only from the date of payment of the duties due upon liquidation. In this case, since Customs was in possession of an amount intended to cover the "duties due upon liquidation" prior to liquidation, the date of payment was the date of liquidation.

(1983). Plaintiff has been awarded monetary relief in the form of interest on the refund it received from Customs subsequent to reliquidation of its merchandise. The action having been brought pursuant to section 515 and a monetary judgment having been awarded, plaintiff is entitled to receive interest under §2644 from the date of the filing of the summons to the date customs pays plaintiff. 28 U.S.C. §2644.

CONCLUSION

Accordingly, the Court holds that plaintiff is entitled to collect interest from Customs on the amount of duty it overpaid. That amount is the difference between what was paid in estimated duties under item 709.15, TSUS, and what rightfully was owed under item 709.17, TSUS, to wit, $88,139.59. Therefore, Customs is directed to pay to HCA interest on $88,139.59 from the date of payment of the excess duty, *i.e.*, the date of liquidation (April 3, 1987), to the date of the filing of the summons (August 3, 1989).[8] Interest shall be at the rate established by law.

Customs also is directed to pay interest on the monetary judgment entered herein pursuant to 28 U.S.C. §2644 from August 3, 1989 until the date payment is made.

(Slip Op. 90–121)

GUESS? INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88–09–00707

MEMORANDUM OPINION AND ORDER

[Defendant's motion for summary judgment granted.]

Dickstein, Shapiro & Morin (*Joel Davidow*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Office (*Nancy M. Frieden*), for defendant.

(Decided November 26 1990)

WATSON, *Judge*: This case is before the court on cross motions for summary judgment, on which the Court heard oral argument. The sole question is whether or not the United States Customs Service was correct to deny a refund of Customs duty otherwise known as "drawback" to Guess, Inc. Guess applied for drawback when it exported certain cotton denim wearing apparel from the United States. This dispute involves a 1984 amendment to the law governing drawback which, for the first time, provided drawback upon the exportation of merchandise which was not the

[8] Interest under § 1520(d) "shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of Title 28, whichever occurs first." 19 U.S.C. § 1520(d). The refund was paid on September 8, 1989, hence the filing of the summons on August 3, 1989 occurred first.

self-same merchandise upon which duty had been paid. The main issue in this case is whether the merchandise exported by plaintiff Guess satisfied the statutory conditions for merchandise seeking the benefits of this new form of drawback. In terms of the relevant statute, which will shortly be discussed, the issue is whether the exported merchandise and the imported merchandise were fungible.

The controversy centers on the fact that although the merchandise exported from the United States was, in almost in all respects, identical to that which was imported, the labels identifying the country of manufacture were different. Those garments exported from the United States bore labels identifying them as made in the United States and the court must explore the legal consequences of that labeling in the circumstances of this case.

Between December 1, 1986 and December 30, 1987, plaintiff Guess exported various cotton denim wearing apparel through the port of Los Angeles, California. Thereafter, Guess filed 24 drawback entries seeking drawback under 19 U.S.C. § 1313(j)(2), as amended by § 202 of the Trade and Tariff Act of 1984, Pub. L. 98573. The Customs Service liquidated the entries and denied the drawback claims on the ground that the merchandise involved did not qualify for such treatment under the law. The government relied on the fact that plaintiff's foreign customers demanded garments which showed that they were made in the United States. This state of affairs was brought to the attention of the Customs Service in a letter from the import manager of plaintiff Guess which stated that "* * * domestically produced garments are the only one shipped overseas as our foreign customers demand the Made in U.S. Label * * *."

Plaintiff Guess argues that labeling should not have a controlling effect on the question of whether or not the U.S. made goods met the statutory requirements. According to Guess, the fungibility of the goods in a general commercial or contractual sense should suffice to bring them within the coverage of the statute. The government takes the position that the existence of a customer preference for garments with a "Made in the U.S." label destroys the fungibility between those garments and garments bearing labels indicating that they were manufactured elsewhere, even though all other physical elements of the garments may be identical.

The Court begins by examining the plain language of § 313(j) of the Tariff Act of 1930 as amended in 1984 by Pl. 98-573, § 201 (19 U.S.C. § 1313(j)(2)). The text of that law reads in part as follows:

(j) Same condition drawback

* * * * * * *

(2) If there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic) that-

(A) is fungible with such imported merchandise;

(B) is, before the close of the three-year period beginning, on the date of importation of the imported merchandise, either exported or destroyed under Customs supervision;

(C) before such exportation or destruction—

(i) is not used within the United States, and

(ii) is in the possession of the party claiming drawback under this paragraph; and

(D) is in the same condition at the time of exportation or destruction as was the imported merchandise at the time of its importation; then upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

(4) The performing of incidental operations (including, but not limited to, testing, cleaning, repacking, and inspecting) on—

* * * * * * *

(B) The merchandise of the same kind and quality in cases to which paragraph (2) applies, that does not amount to manufacture or production for drawback purposes under the preceding provisions of this section shall not be treated as a use of that merchandise for purposes of applying paragraph (1)(B) or (2)(C).

* * * * * * *

The Court notes first that the provision under consideration is a recent refinement of a provision for remission of duties which has been in effect, one way or another, since 1789. Section 2 of the Act of July 4, 1789, ch. II, 1 Stat. 24 provided that if merchandise was exported within twelve months after importation, all but 1% of the duties paid were to be returned. Various forms of drawback have remained in the tariff laws to the present day. The original form of the section under consideration here, when it was first included in the Tariff Act of 1930, 46 Stat. 693, limited the benefits of drawback to merchandise which, after importation, had been manufactured in some way in the United States. In 1980, Congress removed that limitation by amending the Tariff Act of 1930 to authorize "same condition drawback," namely, the drawback of duty paid upon imported merchandise which was subsequently exported without being manufactured. P.L. 96-609, § 201 (a), 94 Stat 3560, adding subsection (j) to § 313 of the Act, 19 U.S.C. § 1313(j). Finally, in 1984, Congress allowed drawback for the exportation of merchandise which was not the actual merchandise upon which duty had been paid. This new concept is called "substitution same condition drawback" and is now encompassed in 19 U.S.C § 1313(j)(2). The law states that the exported merchandise must be "fungible" with the imported merchandise on which duty was paid and for which drawback is sought.

Pursuant to the authority granted to him in 19 U.S.C. § 1313(J)(1) the Secretary of Treasury has issued regulations governing the operation of the provisions for same conditions substitution drawback which define fungible merchandise as "merchandise which for commercial purposes is identical and interchangeable in all situations." 19 C.F.R. § 191.2(b)(1).

The Court undertakes its interpretation of this statute with a number of basic factors in mind. First is the desirability of looking directly to the language of the statute in order to ascertain the meaning of words in dispute. *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *United States v. Turkette*, 452 U.S. 576, 580 (1981). Second, is the basic consideration that drawback is closer to a privilege than a right and all conditions of the statutes and regulations must ordinarily must be established by a claimant. *Swan & Finch Co. v. United States*, 190 U.S. 143, 146–147 (1903). The Supreme Court has stated that drawback is a form of exemption from the operation of the system of tariff duties on imports and that a claim for drawback "is within the general principle that exemptions must be strictly construed, and doubt must be resolved against the one asserting the exemption. *United States v. Allen*, 163 U.S. 499, 504 (1896).

"Fungible" is one of those words in whose definition reference is often made to a legal standard under which one thing may be found acceptable as a substitution for another. Here, the substitution is that of the exported merchandise for the imported merchandise. The question then becomes one of finding the level of "acceptability" which the law requires for such substitution. For a number of reasons the Court reaches the conclusion that the standard adopted by the regulations, namely, that the merchandise be identical for commercial purposes, is correct.

The Court is of the opinion that in allowing substitution of other merchandise for the first time, the choice of the word "fungible" indicates an intention by Congress to identify merchandise which stands in the place of the imported merchandise in all respects. This means that it must stand in the place of the imported merchandise, *but must not be more desirable than*, the imported merchandise. The admission by plaintiff's import manager that only domestically produced garments are exported because foreign customers demand a "Made in U.S. Label" is conclusive. It would be unreasonable to say that labels are too insignificant to effect the tariff fate of merchandise when they have a demonstrated effect on the customers' choice. Of course the converse of such a rule, namely, a presumption that labeling always destroys fungibility would also be unreasonable. The focus of attention here is a label for which a commercial preference has been demonstrated. It is perfectly logical to find that such a preference destroys fungibility when the desideratum is an exemption from the payment of tariff duty. In the opinion of the Court, such a finding is reasonable and lawful.

We are not dealing here with a question of whether a party has satisfied a commercial contract. If that were the case there might be plausibility to plaintiff's argument that the standards of the Uniform Commercial Code [U.C.C.] would dictate that the substituted merchandise con-

formed to a sales contract. If this was a case in which the purchasers from Guess had rejected merchandise bearing a "Made in Hong Kong" label it would seem that their rejection would not be justified under the standards of the U.C.C. See, U.C.C. § 2–601 (defining a buyer's right to reject goods) in conjunction with § 1–201(17 (which defines "fungible," *inter alia*, in terms of "usage of trade."). Here, however, the standard does not arise from ordinary commercial transactions but rather from a legislative exception to the payment of import duties. For the purposes of interpreting the Tariff laws, the meanings and variations developed in other areas of the law cannot be determinative. *Amersham Corp. v. United States*, 5 CIT 49, 56; 564 F. Supp. 813 (1983), *aff'd* 728 F.2d 1483 (Fed. Cir. 1984).

It is the opinion of the Court that Congress did not intend to make merchandise eligible for drawback with the same flexibility or openness with which merchandise is considered fungible in general commercial litigation. In fact, the rather terse explanation in the legislative history of the 1984 amendment states only that the purpose of the new provision was "to expedite merchandise handling and inventory control." 98th Cong., 2d Sess., Cong. and Admin. News at 5023.

There is no support for plaintiff's contention that the 1984 amendment to the drawback law was intended to be a further form of encouragement for the production of articles in the United States and their exportation. Those judicial opinions which spoke of drawback as encouraging American manufacture for export were speaking of instances in which the imported product was processed in the United States and then exported. See for example, *United States v. International Paint Co. Inc.*, 35 CCPA 87, 90 (1948). That situation can be viewed as one in which the only consequence of allowing drawback on the importation is an encouragement of exportation. On the other hand, when substitution drawback theoretically allows imported merchandise to satisfy demand in the United States that is a much more complicated situation than a simple encouragement of U.S. manufacture for exportation. For the courts to consider this in the same category as the earlier consequences of drawback would be disingenuous. In any event, even if substitution drawback had an indisputable salutary effect on U.S. manufactures it would still be an exception to tariff duties and subject to the terms and conditions established by law. Absent some indication that Congress intended that the term "fungible" be given an expansive meaning the meaning required by this statutory context must control.

Guess has also argued that to make customer preference a controlling factor raises potential problems of unpredictability and excessive flux in the administration of the law. Guess poses a hypothetical situation in which an exporter who has been receiving drawback for a certain type of substituted merchandise can lose it suddenly because a single customer develops a preference for some aspect of the merchandise which had not theretofore been considered relevant or important. With respect to this specter of future confusion, the Court notes only that it is not a predict-

able consequence of the holding in this opinion as applied to the facts of this case. Here, there was nothing sudden, unexpected, ephemeral, or fugitive about the customer preference for the garments with labels indicating that they were made in the United States. This was a standardized response made by Guess to the general demands of its customers, and as such, it supports the conclusion that the exported merchandise was distinct from the imported merchandise in a sustained and established manner.

For the reasons given above the Court concludes that the government was correct to deny drawback to this exported merchandise on the ground that it was not fungible with the imported merchandise on which duty had been paid. It is therefore ORDERED, that defendant's motion for summary judgment be, and the same hereby is granted and, consistent with this result, it is further ORDERED that plaintiff's motion for summary judgment is denied.

(Slip Op. 90-122)

NATIONAL HAND TOOL CORP., PLAINTIFF *v.*
UNITED STATES, ET AL., DEFENDANT

Court No. 89-11-00636

MEMORANDUM OPINION AND ORDER

[Motion to amend complaint denied.]

(Decided November 26, 1990)

Skadden, Arps, Slate, Meagher & Flom (*Rodney O. Thorson*) for plaintiff.
Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, United States Department of Justice, (*Barbara M. Epstein*).

DICARLO, *Judge*: National Hand Tool (NHT) moves pursuant to Rule 15(a) of the Rules of this Court for leave to amend its complaint. As the proposed amendments encompasses matters over which the Court does not yet have jurisdiction, the motion is denied.

BACKGROUND

On July 25, 1989, Customs issued a headquarters ruling excluding NHT's imports of steel forgings used in the production of socket wrench sets from the requirement that they be marked with their country of origin. *See* 19 U.S.C. § 1304 (1988); 19 C.F.R. part 134. Despite this ruling, the Customs office in Dallas issued six marking/redelivery notices between August and October of 1989 and four in June of 1990. With respect to all but one class of merchandise, NHT has successfully protested or negotiated a settlement regarding all the entries involved.

The Dallas Customs office has now requested its headquarters to reconsider or clarify the ruling. On being notified of the Dallas office's request, NHT moved to amend its original complaint to seek declaratory relief under 28 U.S.C. § 2201 (1988) and preimportation review under 28 U.S.C. § 2631(h) and (i) (1988). NHT maintains a continuing pattern of harassment by the government makes the amendment necessary and proper. The government opposes arguing the relief sought in the amendments is not within the Court's subject matter jurisdiction.

DISCUSSION

The grant or denial of an opportunity to amend pleadings is within the discretion of the trial court. *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403, *reh'g denied*, 1989 US App LEXIS 3246 (Fed. Cir. 1989). Rule 15(a) of the Rules of this Court provides in part that leave to amend a complaint "shall be freely given when justice so requires * * *." The Court of Appeals for the Federal Circuit recently stated this "mandate" of Rule 15 is to be heeded. *Intrepid v. Pollock*, 907 F.2d 1125, 1128 (Fed. Cir. 1990) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Mitsui Foods*, 867 F.2d at 1403 (discretion should be exercised liberally to permit amendment).

NHT's amended complaint adds a prayer for declaratory relief pursuant to 28 U.S.C. § 2201 (1988) as well as preimportation review under 28 U.S.C. § 2631(h) and (i) (1988). The Court must consider whether the additional actions in the amended complaint fall within its subject matter jurisdiction. *Saint Paul Fire & Marine Ins. Co. v. United States*, 14 CIT ____, 729 F. Supp. 1371, 1373, *appeal docketed*, No. 90-1343 (Fed. Cir. 1990) (appealing Mar. 20, 1990 unpublished order denying motion for rehearing).

> Under section 1581(h) this court has jurisdiction over any civil action commenced to review, prior to importation of the goods involved, *a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling*, relating to classification * * *, but only if the party commencing the civil action demonstrates to the Court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h)(1988)(emphasis added). This provision requires a ruling or a refusal to rule before for the court has jurisdiction over the matter. *American Air Parcel Forwarding Co. v. United States*, 2 Fed. Cir. (T) 1, 7, 718 F.2d 1546, 1551-52, (1983) *cert. denied*, 466 U.S. 937 (1984). As Customs has not yet completed its reconsideration of the headquarters ruling favoring NHT, it appears NHT's amendments are directed at either precluding Customs' reconsideration of that ruling or dictating the outcome of Customs' internal reconsideration process.

In order to invoke jurisdiction under 28 U.S.C. § 15181(h) (1988), plaintiff bears the burden of proving jurisdiction is proper. *See Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). Until customs acts on the Dallas office's request, there is no "ruling issued by the Secretary of the Treasury, or a refusal to issue or change such

a ruling" as required by section 1581(h). As plaintiff presently cannot establish the existence of a ruling within the meaning of section 1581(h), the motion to amend to include a cause of action under section 2631(h) is premature. Plaintiff's motion is, therefore, denied.

Jurisdiction under 28 U.S.C. § 1581(i) (1988) is not available where jurisdiction under another subsection of section 1581 is or could have been available unless the remedies provided under that avenue of relief are manifestly inadequate. *Miller & Co. v. United States*, 5 Fed. Cir. (T) 122, 124, 824 F.2d 961, 963 (1987) *cert. denied* 484 U.S. 1041 (1988). Congress provided for preimportation judicial review under 28 U.S.C. § 1581(h) (1988). As another jurisdictional section provides the appropriate means of invoking the court's jurisdiction over future entries, the motion to amend to include a cause of action under section 2631(i) is denied.

NHT also moves for declaratory relief under 28 U.S.C. § 2201 (1988). That provision provides in part:

> In a case of actual controversy within its jurisdiction * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201 (1988). The Declaratory Judgment Act provides the court with the discretion to grant declaratory relief, *Goodyear Tire & Rubber Co. v. Releasomers, Inc.*, 824 F.2d 953, 956-57 n.7 (Fed. Cir. 1987) (citing *Public Affairs Press v. Rickover*, 369 U.S. 111, 112 (1962)), it does not expand the court's jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *PPG Indus., Inc. v. United States*, 12 CIT ____, 696 F. Supp. 650, 655 (1988). Having found it presently lacks jurisdiction over NHT's future entries, the Court may not issue declaratory judgment under 28 U.S.C. § 2201 (1988).

Further, the Court notes that had it found jurisdiction, it would not have exercised its discretion to grant declaratory relief because the relief sought because is overly broad. If it granted the desired relief, the Court would, in effect, be requiring the future entry of unmarked steel forgings which may not be exempt from the marking requirement. *See Outlet Book Co. v. United States*, 14 CIT ____, 743 F. Supp. 881, 888 (1990).

In deciding whether to grant declaratory relief, the Court must "strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles v. Peoples Bank*, 333 U.S. 426, 431, *reh'g denied*, 333 US 877 (1948). In this case, the need for declaratory relief is remote and speculative. To date, Customs has not taken any action adversely affecting NHT's future imports. Customs has merely asserted its authority to inspect merchandise as it is entered to determine whether it complies with the law and regulations regarding marking. NHT's citation to *Alexander v. "Americans United", Inc.*, 416 U.S. 752, 762 (1974) does not further its argument. In "*Americans*

United", plaintiff challenged the Internal Revenue Service's revocation of a prior ruling making it exempt from the payment of federal unemployment taxes and allowing its contributors to make tax-deductible contributions. Plaintiff sought declaratory judgment and injunctive relief. The Supreme Court dismissed the complaint finding the action was barred by the Anti-Injunction Act. In dismissing the action, the Court stated "respondent will have a full opportunity to litigate the legality of the Service's withdrawal of * * * [the] ruling letter in a refund suit following the payment of FUTA taxes." *Id.* at 762.

CONCLUSION

Questions have been raised regarding the willingness of Customs' Dallas office to follow headquarters rulings. Nevertheless, the Court finds it presently lacks jurisdiction under 28 U.S.C. § 1581(i) and (h) (1988) to grant the requested relief. In addition, the Court will not attempt to fashion a declaratory judgment which would limit Customs' authority to inspect NHT's entries and make judgments on whether those entries have been imported in compliance with law and Customs regulations. Plaintiff's motion is denied.

(Slip Op. 90–123)

FORMER EMPLOYEES OF AT&T TECHNOLOGIES, DALLAS WORKS, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 89–10–00548

ON PLAINTIFFS' MOTION TO REMAND

Plaintiffs move to remand, to the Secretary of Labor, their petition for trade adjustment assistance benefits. Plaintiffs contend that there is new evidence in support of their petition.

Held: Since plaintiffs have failed to show "good cause" for the remand, the motion is denied.

[Plaintiffs' motion denied.]

(Dated November 26, 1990)

David Amesquita, pro se.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Vanessa P. Sciarra* and *A. David Lafer*) and (*Scott Glabman*, Department of Labor, Of Counsel), for defendant.

RE, *Chief Judge*: In this action, the plaintiffs, the former employees of AT&T Technologies, Dallas Works, seek judicial review of the Secretary of Labor's denial of their petition for certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974. *See* 19 U.S.C. §§ 2271–2321, 2395 (1988). This action is before the

court on plaintiffs' motion to remand to the Secretary of Labor for reconsideration. Plaintiffs contend that there is new evidence in support of their petition.

After reviewing the administrative record and the contentions of the parties, the court finds that plaintiffs have failed to show good cause for a remand. Hence, the plaintiffs' motion is denied.

Background

This action arises from a petition for certification of eligibility for trade adjustment assistance benefits for the former employees of AT&T, Dallas Works, who were separated from employment in February, 1989. In denying plaintiffs' petition, the Secretary expressly determined that production and sales at the AT&T Dallas Works plant increased in 1988 compared with 1987, and from January through May, 1989 compared with January through May, 1988. Hence, the Secretary denied the plaintiffs certification for trade adjustment assistance benefits since the plaintiffs had not satisfied the requirement "that sales or production, or both, of such firm or subdivision have decreased absolutely." 19 U.S.C. § 2272(a)(2) (1988).

The action before this court was commenced by a letter written by David Amesquita, president of the Communications Workers of America, Local 6260, on behalf of the plaintiffs. For purposes of this action, the letter was deemed to be a summons and complaint.

Subsequently, Mr. Amesquita filed a second letter containing "new evidence" pertaining to plaintiffs' petition. Enclosed with the letter were eleven pages of computer printouts and thirty-five handwritten pages. The pages consisted of lists, and contained code numbers and abbreviations. According to the plaintiffs, the material "contains detailed products, and selects that have went to [AT&T's plant in] Matamoros, Mexico" from the Dallas Works plant.

In a third letter filed by Mr. Amesquita, the plaintiffs moved that their petition be remanded to the Secretary "in light of new information recently sent. * * *" Contending that the plaintiffs have failed to show "good cause," as required by 19 U.S.C. § 2395(b), the defendant opposes the plaintiffs' motion for a remand.

Discussion

On judicial review of a trade adjustment assistance case, "the court, *for good cause shown*, may remand the case to [the] Secretary to take further evidence, and [the] Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings." 19 U.S.C. § 2395(b) (1988) (emphasis added). Furthermore, on a motion for remand in a trade adjustment assistance case, the plaintiff has the burden of showing good cause. *See Retail Clerks Int'l Union Local 149F v. Donovan*, 10 CIT 308, 313 (1986).

In this case, the plaintiffs have neither stated nor established the relevance of the new evidence to the Secretary's express finding that the

sales or production at AT&T's Dallas Works plant did not decrease during the relevant period. Nonetheless, the court has examined the materials submitted, and concludes that, on the administrative record before the court, the court is unable to determine the relevance or materiality of the "new evidence" submitted. Hence, the plaintiffs have failed to show good cause in support of their motion for a remand.

CONCLUSION

In view of the foregoing, plaintiffs' motion to remand is denied. Since this case has been tried pro se, plaintiffs have 45 days, from the date of entry of the order in this case, either to renew their motion for remand, disclosing good cause for a remand, or to file a motion for judgment upon the agency record.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/515 11/6/90 Aquilino, J.	A Classic Time	86–6–00733	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches
C90/516 11/6/90 Aquilino, J.	Eastman Watch Co.	86–5–00596	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches
C90/517 11/6/90 Aquilino, J.	F & K Watch Co.	86–5–00595	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches
C90/518 11/6/90 Aquilino, J.	Grundig Electric Co.	86–5–00679	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches
C90/519 11/6/90 Aquilino, J.	Solomon Kaufman	86–5–00597	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/520 11/8/90 Aquilino, J.	Zayre Corp.	88-3-00187	533.39 14.5%	651.75 7.8% + 0.5c per doz. pcs.	Agreed statement of facts	Boston Barbecue tool sets
C90/521 11/13/90 Re, C.J.	American Exhaust Ind., Inc.	86-1-00048	657.25 Various rates	647.01 Various rates	Agreed statement of facts	San Diego Metal articles
C90/522 11/14/90 DiCarlo, J.	Minolta Corp.	83-6-00825	410.22 Various rates	408.41 Various rates	Agreed statement of facts	New York Developer
C90/523 11/14/90 DiCarlo, J.	Milonta Corp.	84-1-00121	410.22 Various rates	408.41 Various rates	Agreed statement of facts	New York Developer
C90/524 11/14/90 Tsoucalas, J.	Sarne Handbag Co.	87-12-01183	706.41 20%	706.34 11.6%	Agreed statement of facts	New York Handbags
C90/525 11/15/90 Aquilino, J.	Dataproducts Corp.	89-9-00504	410.22 15%	408.41 8.5% 676.54 Free of duty	Agreed statement of facts	Los Angeles Toner and cartridges
C90/526 11/19/90 Aquilino, J.	Barfield Instrument Corp.	89-10-00574	676.15 3.9%	806.20 Free of duty	Agreed statement of facts	Miami Flight Warning computer
C90/527 11/19/90 Aquilino, J.	Oriental Trading Corp.	88-9-00709	700.57 Various rates	700.56 6%	Agreed statement of facts	Miami Footwear

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